SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 8, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, JJ.

12407N Calvin E. Thomas, Index 311416/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

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Upon remittitur from the Court of Appeals for consideration of issues raised but not determined on appeal to this court (25 NY3d 1087 [2015]), order Supreme Court, Bronx County (Norma Ruiz, J.), entered February 4, 2013, which granted defendant's motion to strike from the bill of particulars allegations concerning the handrail of the staircase where plaintiff allegedly fell, and denied plaintiff's cross motion for leave to amend the notice of claim, unanimously reversed, on the law, without costs, plaintiff's cross motion granted, and defendant's motion denied

as moot.

On the prior appeal, we held that plaintiff's claim that defendant failed to maintain the handrail along the stairway at or near the second floor could be fairly inferred from the notice of claim, which alleged that defendant was negligent in maintaining the second floor landing area (*see* 120 AD3d 401, 402 [2014], *revd* 25 NY3d 1087 [2015]; *Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291 [1st Dept 2006]). The Court of Appeals disagreed, holding that the allegations in the notice of claim were insufficient to put defendant on notice of allegations in the bill of particulars concerning the handrail, and it remitted the case to us for consideration of issues raised but not determined on the prior appeal (25 NY3d at 1098]).

The motion court should have granted plaintiff's cross motion to amend the notice of claim. Although plaintiff did not specifically invoke General Municipal Law (GML) § 50-e(5) in the cross motion, the motion court should have exercised its discretion under CPLR 2001 to treat the motion as having been made under GML § 50-e(5) (*see Perez v Jordan*, 37 AD3d 200, 203 [1st Dept 2007]; *see also Blainey v Metro No. Commuter R.R.*, 99 AD3d 588, 590 [1st Dept 2012] ["the denial of relief sought pursuant to the wrong statute in the trial court may be reviewed

on appeal under the standards of the appropriate statute where the record affords a basis for so doing"], *lv denied* 21 NY3d 859 [2013]). Under GML § 50-e(5), a notice of claim may be amended within one year and ninety days of an accident to include new theories of liability (*see Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Plaintiff's cross motion was made eleven months after the accident, well within the one-year-and-ninety-day limitation period.

In determining whether an application for leave to serve a late notice of claim should be granted, a court shall consider "whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one . . . or within a reasonable time thereafter" (GML § 50-e[5]). The court shall also consider "all other relevant facts and circumstances," including whether the delay "substantially prejudiced the public corporation in maintaining its defense on the merits" (*id.*).

"In determining whether the city was prejudiced by any mistake, omission, irregularity or defect in the notice [of claim], 'the court may look to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court'" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [1st

Dept 2007] quoting *D'Alessandro v New York City Tr. Auth.*, 82 NY2d 891, 893 [1994]).

The 50-h hearing in this case took place on November 10, 2011, within 90 days of the August 14, 2011 accident. At the hearing, plaintiff testified that he slipped on a puddle of urine and feces on the rubbish-strewn landing. He described how, immediately preceding the fall, he was descending the stairs while sliding his hand down the railing. He testified that he let go of the railing because of a lock at the bottom of the handrail. He also identified photographs of the stairwell, including the handrail with the lock. Thus, defendant was aware by the time of the hearing that plaintiff was claiming that he released his grip on the railing because of the lock.

There is no evidence that an investigation was hampered in any way by the alleged deficiencies in the notice of claim (*compare Nieves v City of New York*, 262 AD2d 32 [1st Dept 1999] [original notice incorrectly designated location of the infant plaintiff's school and caused defendants to conduct an investigation at the wrong site]). Indeed, it is not apparent from the record whether defendant conducted an investigation of the stairwell and landing in the aftermath of the accident.

We have previously held that prejudice will not be presumed (*see Williams v City of New York*, 229 AD2d 114, 117 [1st Dept 1997]). Moreover, "[i]t may not be shown without evidence of an attempt to investigate the accident" (*Goodwin v New York City Hous. Auth.*, 42 AD3d at 68). Given defendant's actual knowledge of the facts constituting the claim within a reasonable time after the accident, and the lack of evidence of an attempt to conduct an investigation either before or after it obtained knowledge of the issue concerning the handrail in this accident (*see Ciaravino v City of New York*, 110 AD3d 511, 511-512 [1st dept 2013]), "conclusory assertions of prejudice, based solely on the delay in serving the notice of claim, are insufficient" (*Matter of Lopez v City of New York*, 103 AD3d 567, 568 [1st Dept 2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, JJ.

14678 Endurance American Specialty Insurance Company, et al., Plaintiffs-Appellants, Index 650703/13

-against-

Utica First Insurance Company, Defendant-Respondent,

CFC Contractor Group, Inc., Defendant.

_____

White Fleischner & Fino, LLP, White Plains (Craig Rokuson of counsel), for appellants.

Farber Broocks & Zane, LLP, Garden City (Sherri N. Pavloff of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered November 22, 2013, declaring that defendant Utica First Insurance Company (Utica) has no duty to defend or indemnify plaintiffs in the underlying lawsuit, and dismissing the complaint, unanimously reversed, on the law, without costs, the complaint reinstated, the declaration vacated, Utica's motion to dismiss and for a declaration denied, and it is declared that Utica is obliged to defend and indemnify plaintiffs in the underlying action.

This action arises out of an October 16, 2011 accident in which an employee of defendant CFC Contractor Group, Inc.

allegedly suffered injuries in the course of his work. The employee commenced the underlying action against, among others, plaintiff Adelphi Restoration Corp., seeking to recover damages for his injuries.

Adelphi commenced a third-party action against CFC seeking contribution, common-law indemnification, contractual indemnification, damages for breach of contract to procure insurance, and reimbursement of attorneys' fees and costs incurred in defending the employee's action. Specifically, Adelphi sought additional insured coverage from Utica under an insurance policy that Utica had issued to CFC.

The Utica policy contained an additional insured endorsement conferring additional insured coverage on entities for which CFC was required to procure additional insured coverage under a written agreement executed before the date of the alleged loss (the blanket endorsement). However, the Utica policy also contained an exclusion for bodily injuries sustained by employees of any insured, or by contractors or employees of contractors "hired or retained by or for any insured." Thus, additional insured coverage was triggered when there was a written contract and when the claim arose out of the insured's work; however, coverage did not apply to an employee of any insured.

Adelphi concedes that on its face, the employee exclusion precludes coverage to it and to CFC; however, Adelphi contends that the timing of Utica's disclaimer to it precludes Utica from denying it coverage. We agree.

Utica first received notice of the accident on November 16, 2011 from Rockville Risk Management (Rockville), the third-party administrator for plaintiff Endurance American Specialty Insurance Company, Adelphi's insurer. By letter dated November 21, 2011, Utica informed CFC that it was denying coverage for the accident, citing the employee exclusion. In its correspondence, Utica stated that it would not provide coverage "to you or any other party seeking coverage under this policy of insurance for damages arising out of this incident." Utica further stated that it would "not defend any legal action against you or any other party; [would] not indemnify our insured *or any other party* for any judgment awarded; and [would] not make any payment on our insured or any other party's behalf in connection with damages arising out of this event." Utica did not inform Adelphi directly of the denial, but sent Rockville a copy of this letter.

By letter dated May 10, 2012, Rockville, on behalf of Endurance and Adelphi, tendered its defense and indemnity to Utica, noting that CFC had entered into a contract with Adelphi.

However, Rockville did not include a copy of the contract. On November 20, 2012, Rockville sent another tender letter to Utica on behalf of Endurance and Adelphi, requesting a response to its earlier tenders and noting that Utica had not responded to the earlier tender on Adelphi's behalf.

On January 25, 2013, Rockville, on behalf of Adelphi, sent Utica a copy of the contract that triggered the blanket endorsement for Adelphi's benefit; Utica received that letter on January 28, 2013. One day later, on January 29, 2013, Utica informed Adelphi and Rockville that although Adelphi had provided a contract requiring that it be named as an additional insured on the Utica policy, the employee exclusion precluded coverage for the accident.

Utica's disclaimer of liability for coverage by letter dated November 21, 2011 to its named insured, defendant CFC, did not constitute notice to additional insured Adelphi under Insurance Law § 3420(d)(2) (*see Sierra v 4401 Sunset Park, LLC*, 24 NY3d 514 [2014]). Further, although Utica knew by November 21, 2011, at the latest, that the employee exclusion applied to the employee's alleged accident, Utica did not immediately disclaim coverage on that basis; it instead waited to disclaim coverage until January 29, 2013 – one day after it had received the contract that

triggered the blanket endorsement. However, Insurance Law § 3420(d) "precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid . . . while investigating other possible grounds for disclaiming" (*George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104 [1st Dept 2012]; *see also City of New York v. Northern Ins. Co. of N.Y.*, 284 AD2d 291 [2d Dept 2001], *lv dismissed* 97 NY2d 638 [2001]).

If Adelphi was not entitled to coverage because of the employee exclusion, it did not matter one way or the other whether it was an additional insured under the CFC/Utica policy, and Utica therefore did not need to investigate Adelphi's status in order to disclaim coverage under the exclusion (*see George Campbell Painting*, 92 AD3d at 111-112). Indeed, given its statement that it would not indemnify "our insured *or any other party* for any judgment awarded," Utica must have known that the employee exclusion was effective not only as to CFC but also as

to Adelphi, and therefore, Utica should have immediately disclaimed to Adelphi on that basis. Thus, Utica's investigation as to whether Adelphi was an additional insured was insufficient as a matter of law as the basis for a disclaimer.

The Decision and Order of this Court entered herein on March 31, 2015 is hereby recalled and vacated (*see* M-1663 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15738 The People of the State of New York, Ind. 750/10
Respondent,

-against-

Erik Sabori,
Defendant-Appellant.

_____

The Legal Aid Society, New York (Seymour W. James, Jr. and Amy Donner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered April 5, 2011, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of three years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence disproved defendant's justification defense beyond a reasonable doubt.

Defendant's claim that the trial court erred when, after rejecting a partial verdict, it told the jury to resume deliberations without explicitly stating that the deliberations should be "upon the entire case" (CPL 310.70 [1][b][ii]), is

unpreserved (*see People v Freire*, 232 AD2d 254 [1st Dept 1996], *lv denied* 89 NY2d 942 [1997]), and we decline to review it in the interest of justice. As an alternative holding, we would find that the court's failure to instruct the jury to continue their deliberations upon the entire case pursuant to CPL § 310.70 was of no consequence. The error was subsequently remedied when the jury later reached, and the court accepted, a partial verdict identical to the verdict previously rejected by the court (*see People v Collado*, 211 AD2d 639 [2d Dept 1995], *lv denied* 85 NY2d 971 [1995]; *People v Williams*, 114 AD2d 683, 684-685 [3rd Dept 1985]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Corrected Order - October 8, 2015

Mazzarelli, J.P., Sweeny, Manzanet-Daniels, Gische, JJ.

15739 The People of the State of New York, Respondent, Ind. 2484/90

-against-

Isaiah Smith, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about December 21, 2011, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although the evidence does not support an assessment of 30 points for use of a dangerous instrument, the court should have assessed 10 points, under the same risk factor, for use of forcible compulsion (*see People v Coleman*, 42 NY2d 500, 505-506 [1977]). The court also erred in assessing 10 points under the risk factor for the recency of defendant's prior felony, since he had been released from incarceration in that case more than four

years before he committed the underlying crime. Without the 30 improperly assessed points, defendant remains a level three offender with a point score of 115, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15811 The People of the State of New York, Ind. 2822/12
Respondent,

-against-

James Kelly,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered on February 14, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

Defendant's suppression motion was properly denied. The totality of circumstances supports the court's finding of abandonment (*see People v Murray*, 256 AD2d 116 [1st Dept 1998], *lv denied* 92 NY2d 1052 [1999]). The police had information that a man meeting defendant's description had a firearm in a black bag. As the police arrived at the scene, defendant looked at the uniformed officers, turned and walked into a store, where he immediately placed the black bag he was carrying on a countertop

and then turned and walked away from it toward the store's exit, leaving his bag visible and unattended in a publicly accessible area. These circumstances supported the inference that defendant intended to divest himself of the bag in order to avoid being caught in possession of the pistol contained in the bag and ultimately found by the police. Accordingly, defendant gave up his expectation of privacy in the bag.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15813-
15814 In re Geoffrey Colin D.,
Petitioner-Respondent,

-against-

Janelle Latoya A.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Anne Reiniger, New York, attorney for the child.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about January 24, 2014, which denied respondent's motion to vacate a final order of custody to petitioner, entered on default on or about April 23, 2013, unanimously affirmed, without costs.

The Referee's findings, that respondent failed to substantiate her claims of a reasonable excuse and a meritorious defense are supported by the record. Specifically, respondent's claim that she did not receive notice of the April 23, 2013 inquest is credibly refuted by the mailing sent to her by the clerk of the court, to her confidential address, and the affidavit of the child's attorney stating that he provided

respondent with actual notice of the inquest, during a telephone call. Moreover, respondent provided no documentary evidence to support her meritorious defense claim that she was in a car accident, asked petitioner to keep the child for a few more weeks, and was unable to reach petitioner from January to March 2013. Under these circumstances, the Family Court providently exercised its discretion in denying respondent's motion to vacate the final order of custody entered on default (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15815 The People of the State of New York, Ind. 3619/09
Respondent,

-against-

Mario Abreu,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Desiree Sheridan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered June 19, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him to an aggregate term of 30 days and 5 years' probation, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that defendant participated in a

sale of drugs to an undercover buyer by providing drugs to a codefendant for immediate transfer to the buyer. The jury's mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

Defendant's challenges to the court's charge are unpreserved because defense counsel never claimed that the charge, as delivered, failed to satisfy the concerns counsel raised at the charge conference (*see People v Lewis*, 5 NY3d 546, 551 [2005]; *People v Whalen*, 59 NY2d 273, 280 [1983]). We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the charge conveyed the proper standards concerning accessorial liability, and that there was no reasonable possibility that the jury could have been misled into convicting defendant on an improper theory.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15816 The People of the State of New York, Ind. 3737/10
Respondent,

-against-

Jamel Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 25, 2012, convicting defendant, after a jury trial, of murder in the second degree, robbery in the first degree (two counts), robbery in the second degree and burglary in the second degree (two counts), and sentencing him to an aggregate term of 18 years to life, unanimously affirmed.

The People established an overriding interest that warranted a courtroom closure that was limited to the exclusion of a single spectator during the testimony of a single witness (*see Waller v Georgia*, 467 US 39 [1984]). Contrary to defendant's arguments, the witness articulated a specific fear of testifying in the presence of defendant's brother, and we find that this fear justified the limited closure (*see People v Ming Li*, 91 NY2d 913,

917 [1998]; *see also People v Joseph*, 59 NY2d 496 [1983]). The trial court was in the best position to determine whether the witness' expression of fear rose to a level justifying the closure. We note that the court was aware of the brother's approach to a different witness. Although "a timely objection . . . would have permitted the court to rectify the situation instantly by making express findings" (*People v Doster*, 13 AD3d 114, 115 [2004], *lv denied* 4 NY3d 763 [2005]), defendant made no such objection, and thus did not preserve his complaint that the court failed to set forth express findings of fact to justify the exclusion of defendant's brother. Accordingly, we decline to review this claim in the interest of justice. As an alternative holding, we find that the court's ruling "implicitly adopted the People's particularized showing" and was "specific enough that a reviewing court can determine whether the closure order was properly entered" (*id.*; *see also People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011], *cert denied* 565 US__, 132 S Ct 268 [2011]).

The court properly exercised its discretion in denying defendant's mistrial motion, made after a juror reported possible premature deliberations. The court conducted thorough individual inquiries of the jurors, which established that there were no

actual premature deliberations. There is no basis for disturbing the court's credibility determinations (*see People v Jamison*, 291 AD2d 298, 299 [1st Dept 2002], *lv denied* 98 NY2d 652 [2002]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15820-
15821 In re William G.,
Petitioner-Respondent-Appellant,

-against-

Saline G.,
Respondent-Appellant-Respondent.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant-respondent.

Douglas H. Reiniger, New York, for respondent-appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Eva D. Stein of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about September 25, 2014, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, granted the father's petition for visitation with his children to the extent of awarding an annual visitation at the Southport Correctional Facility or any other facility where he was incarcerated that is "within the same proximity" as Southport, on condition that he pay the mother $200 towards the cost of the visit within 90 days before it is held, unanimously affirmed, without costs.

The Family Court's decision to allow the father visitation, but to limit visitation to one time per year, has a sound and substantial basis in the record. The court properly took into consideration the totality of the circumstances, including the children's position, as expressed through their attorney, as well as the burden and cost involved in the lengthy trip from Bronx County to an upstate facility, in determining that an annual in-person visit with the father was in the children's best interests (*see Matter of Granger v Misercola*, 21 NY3d 86, 90 [2013]; *Matter of Garraway v Laforet*, 68 AD3d 1192, 1193-1194 [3rd Dept 2009]; *Matter of Lewis v Lowney*, 296 AD2d 624, 624-625 [3rd Dept 2002]). The fact that the mother objects to having to make the trip is not a reason to deny the father visitation (*see Matter of Kadio v Volino*, 126 AD3d 1253, 1255 [3rd Dept 2015]).

The request of the attorney for the children that the geographic proximity requirement of the order be clarified, as

well as the father's concerns about lack of communication, can best be addressed in the context of a modification petition (*see Matter of Lapham v Senecal*, 125 AD3d 1210, 1211 [3rd Dept 2015]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15823 The People of the State of New York, Ind. 4722/13
Respondent,

-against-

Stewart Jeffrey, etc.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Ronaldo Alfano of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey Richards of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about January 21, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: OCTOBER 8, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15825 The People of the State of New York, Ind. 4904/12
Respondent,

-against-

Sampson Taylor,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 9, 2013, as amended July 24, 2013, convicting defendant, upon his plea of guilty, of criminal sale of a firearm in the first degree and conspiracy in the fourth degree, and sentencing him to an aggregate term of 16 years, unanimously affirmed.

Defendant's argument that his guilty plea was invalid because the court failed to advise him of one of his rights under *Boykin v Alabama* (395 US 238 [1969]) is unpreserved (*see e.g. People v Jackson*, 114 AD3d 807 [2d Dept 2014], *lv denied* 22 NY3d 1199 [2014]), and we decline to review it in the interest of justice. Unlike the situation in *People v Tyrell* (22 NY3d 359, 364 [2013]), defendant had the opportunity to move to withdraw

his plea or otherwise raise the issue, and the deficiency did not rise to the level of a mode of proceedings error. As an alternative holding, we find that the record establishes the voluntariness of the plea (*see Tyrell*, 22 NY3d at 365; *see also People v Harris*, 61 NY2d 9, 16-19 [1983]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15826 Women's Interart Center, Inc., Index 113088/07
Plaintiff-Appellant, 109017/07

-against-

New York City Economic Development Corporation, et al.,
Defendants-Respondents.

- - - - -

Women's Interart Center, Inc.,
Plaintiff-Appellant,

-against-

Clinton Housing Development Fund Corp.,
Defendant-Respondent.

_____

Kristin Booth Glen, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for New York City Economic Development Corporation, City of New York, Daniel Doctoroff, and Michael Bloomberg, respondents.

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz of counsel), for Clinton Housing Development Fund Corp., respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered May 19, 2014, which, insofar as appealed from as limited by the briefs, granted the City defendants' motion for summary judgment dismissing the causes of action for breach of contract and tortious interference with contract, and granted defendant Clinton Housing Development Fund Corp.'s motion for a

judgment of possession and a warrant of eviction against plaintiff in a landlord-tenant proceeding previously consolidated with these actions, and remanded this and other related holdover proceedings to Civil Court for further proceedings, unanimously affirmed, without costs.

The court correctly dismissed the breach of contract claim upon the finding that defendant New York City Economic Development Corporation (EDC) had valid grounds to terminate the agreement, i.e., that plaintiff did not comply with its obligation to demonstrate sufficient financing by the closing date, and since EDC's termination of the agreement on this basis was consistent with the express terms of the agreement, a claim for breach of the covenant of good faith and fair dealing is not viable (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). Given the valid basis for EDC's termination of the agreement, there was no "actual breach" and therefore no viable claim for tortious interference against the other City defendants (*see Alavian v Zane*, 101 AD3d 475 [1st Dept 2012], *lv denied* 21 NY3d 862 [2013]).

The court correctly determined that plaintiff has no valid defense against the claim for judgment of possession in the

landlord-tenant proceeding under appeal. Nor does plaintiff present any compelling basis for staying the ordered eviction. Accordingly, the court properly resolved the issues in that proceeding and remanded the holdover proceedings to Civil Court for further disposition.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15827 In re Mark Parrish, Index 101595/13
Petitioner-Appellant,

-against-

New York City Loft Board, et al.,
Respondents-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about May 23, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 16, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15828-
15829 In re Jasiah B.,

A Child Under Eighteen
Years of Age, etc.
- - - - -
Hydeia B.,
Respondent-Appellant,

-against-

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about August 7, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 7, 2014, which, after a hearing, determined that respondent mother had neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence establishes that there was a "substantial probability" that the teenage mother's untreated psychiatric condition and substance abuse problems would place the newborn child at imminent risk of harm if he were released to her (*see Matter of Liarah H. [Dora S.]*, 111 AD3d 514, 515 [1st Dept 2013]; Family Ct Act § 1012[f]). The finding of neglect was further supported by evidence that, during her pregnancy, the mother failed to plan for the care of the child and was frequently absent without leave from the residential facility where she had been placed as a result of a juvenile delinquency proceeding.

The court properly drew a negative inference against the mother based on her failure to testify, and her failure to appear at the fact-finding hearing on several dates (*see Matter of Aria E. [Lisette B.]*, 82 AD3d 427, 428 [1st Dept 2011], *lv denied* 17 NY3d 704 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15830 The People of the State of New York, Ind. 4252/10
Respondent,

-against-

Daniel Conklin,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Sharmeen Mazumder of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered May 8, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The evidence established that an officer saw defendant in the hallway outside of his apartment with a firearm in plain view.

The court's *Sandoval* ruling, which permitted inquiry into only some of defendant's convictions, and precluded inquiry into their underlying facts, was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455,

458-459 [1994]).

The court appropriately instructed the jury that the hallway outside of defendant's apartment was, as a matter of law, outside of defendant's "home" for purposes of Penal Law § 265.03(3), because defendant lacked a privacy interest in a hallway open, at least, to all residents and their invitees, and there was no factual issue to be resolved by the jury (*see People v Powell*, 54 NY2d 524, 530-531 [1981]; *People v Porto*, 273 AD2d 139 [1st Dept 2000], *lv denied* 95 NY2d 907 [2000]; *see also People v White*, 75 AD3d 109, 121-122 [2d Dept 2010], *lv denied* 13 NY3d 758 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15831 The People of the State of New York, Ind. 4556/02
Respondent,

-against-

Earl Garvin,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about December 13, 2012, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15832 The People of the State of New York, Ind. 945/07
Respondent,

-against-

Maria Rios,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered March 11, 2011, convicting defendant, after a jury trial, of murder in the first degree, and sentencing her to a term of life without parole, unanimously affirmed.

Defendant's claim that the evidence was legally insufficient to establish the intent element of first-degree murder is unpreserved and we decline to review it in the interest of justice. As an alternate holding, we reject the claim on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Where defendant arrived at the victim's apartment armed, robbed her, threatened to kill her, chased her into the hallway, and fired multiple times, at least twice at close range,

including a fatal shot to the victim's chest, defendant's homicidal intent could be readily inferred (*see People v Byfield*, 15 AD3d 262 [1st Dept 2005], *lv denied* 4 NY3d 884 [2005]; *see also People v Sanducci*, 195 NY 361, 367-368 [1909]), and the evidence does not support a conclusion that defendant merely shot the victim during a struggle.

We perceive no basis for reducing the sentence.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15833N Tammy Weinstein, et al., Index 105520/11
Plaintiffs-Respondents,

-against-

Jenny Craig Operations, Inc.,
Defendant-Appellant.

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Ogletree, Deakins, Nash, Smoak & Stewart, P.C., New York (Stephanie L. Aranyos of counsel), for appellant.

Virginia & Ambinder, LLP, New York (Suzanne Leeds Klein of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 8, 2014, which denied defendant's motion to exclude from this class-action litigation all employees who had signed arbitration agreements containing class-action waivers after this litigation was commenced, unanimously modified, on the law, to grant so much of the motion as sought to exclude those employees who were hired after the litigation was commenced and signed arbitration agreements containing class-action waivers, and otherwise affirmed, without costs.

Defendant had a plausible explanation as to why it initiated a change in its arbitration agreements to include class-action waivers on the very day plaintiffs filed this class action litigation, in that it was responding to the United States

Supreme Court's decision in *AT&T Mobility LLC v Concepcion* (563 US 333 [2011]), decided April 27, 2011, which held that the FAA (9 USC § 1 *et seq.*) preempts all state laws that hold that class-action waivers with employees are unconscionable. Defendant also plausibly explained that it was unaware of the litigation, which was filed with the New York Secretary of State and was not served on defendant until seventeen days after commencement of the action.

Nevertheless, defendant actually implemented its new arbitration agreement on the very day the litigation was commenced, and commenced execution of these agreements the next day. Moreover, even after service of the summons and complaint on defendant, it continued having putative class member employees sign the arbitration agreements, without informing them of the existence of this class action litigation or of their right to join this action. Given the authority granted to the court to protect putative class members and the fairness of the process (*see Carnegie v H&R Block*, 180 Misc 2d 67, 70-72 [Sup Ct, NY County 1999]; *Alfaro v Vardaris Tech, Inc.*, 69 AD3d 436 [1st Dept 2010]; CPLR 907), the court properly exercised its discretion by drawing the inference that the agreements had been implemented in response to this litigation and to preclude putative class

members. Thus, the court properly declined to enforce those agreements signed after commencement of this litigation (*see Alfaro*, 69 AD3d 436; *In re Currency Conservation*, 361 F Supp 2d 237, 251-252 [SD NY 2005]).

However, we find that the court improperly held that defendant had waived its right to arbitrate, by its involvement in the instant litigation or by waiting to make the motion to enforce the arbitration agreements until after the court certified the class (*see Larsen v Citibank FSB [In re Checking Account Overdraft Litig.]*), 780 F3d 1031, 1037 [11th Cir 2015]; *Allied Sanitation, Inc. v Waste Mgt. Holdings, Inc.*, 97 F Supp 2d 320, 327-328 [ED NY 2000]).

Finally, the court improperly refused to enforce the arbitration agreements signed by those employees who did not work for defendant but were hired after the litigation was commenced. These employees were never part of the putative class, as they had not yet worked for defendant and had no pay improperly withheld. Thus, preclusion of the enforcement of the arbitration

agreements should not have applied to these employees (*see In re Currency Conservation*, 361 F Supp at 258; *Balasanyan v Nordstrom, Inc.*, 294 FRD 550, 573 [SD Cal 2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14738-
14739N NAMA Holdings, LLC, etc.,
Plaintiff-Respondent,

-against-

Greenberg Traurig LLP, et al.,
Defendants-Appellants,

Related World Market Center LLC,
Defendant.

Index 601054/08

_____

Steptoe & Johnson LLP, New York (Justin Y.K. Chu of counsel), for Greenberg Traurig LLP and Robert J. Ivanhoe, appellants.

Dorsey & Whitney LLP, New York (Jonathan Montcalm of counsel), for Shawn Samson and Jack Kashani, appellant.

Berger & Webb LLP, New York (Jonathan Rogin of counsel), for respondent.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered April 30, 2013, and August 29, 2014, reversed, on the law, with costs, the motion denied, and the matter remanded for further proceedings consistent herewith.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Karla Moskowitz
Rosalyn H. Richter
Barbara R. Kapnick, JJ.

14738-14739N
Index 601054/08

_____x

NAMA Holdings, LLC, etc.,
Plaintiff-Respondent,

-against-

Greenberg Traurig LLP, et al.,
Defendants-Appellants,

Related World Market Center LLC,
Defendant.
_____x

Defendants Greenberg Traurig LLP, Robert J. Ivanhoe, Shawn Samson and Jack Kashani appeal from the orders of Supreme Court, New York County (Eileen Bransten, J.), entered April 30, 2013, and August 29, 2014, which granted plaintiff's motion to compel the production of certain privileged documents.

Steptoe & Johnson LLP, New York (Justin Y.K. Chu of counsel), for Greenberg Traurig LLP and Robert J. Ivanhoe, appellants.

Dorsey & Whitney LLP, New York (Jonathan Montcalm and David C. Singer of counsel), for Shawn Samson and Jack Kashani, appellant.

Berger & Webb LLP, New York (Johnathan Rogin and Steven A. Berger of counsel), for respondent.

ACOSTA, J.

This appeal arises from a discovery dispute in which the managers of a limited liability company and corporate counsel invoke the attorney-client privilege in opposition to document requests by one of the company's investors. The investor argues that it is entitled to the so-called fiduciary exception to the privilege because it is a beneficiary of the attorney-client relationship that exists between the company's managers and counsel. The managers and counsel, on the other hand, contend that because the investor had interests that were adverse to the company's interests, the fiduciary exception is inapplicable. Supreme Court found that the parties were not adverse, and ordered the production of all the documents claimed to be privileged.

We conclude that "adversity" is not a threshold issue in determining whether the fiduciary exception is applicable in a given case, but one of several factors to consider in making that determination, and that adversity cannot be determined without a review of the purportedly privileged communications. Therefore, we remand the matter for an in camera review of the withheld documents and a full analysis of whether the exception is applicable in this case. Absent a more deliberate review and analysis, the risk of disclosure of privileged communications is

manifest.

I. Facts and Background

The Alliance Network, LLC (Alliance), is an entity that was created to build and develop commercial properties in Las Vegas, Nevada. The properties were slated to become the world's largest showroom facility, known as the World Market Center (the WMC Project).

Plaintiff, NAMA Holdings, LLC (NAMA), is the majority investor in Alliance. Defendants Jack Kashani and Shawn Samson are Alliance's managers (the Managers), and defendants Greenberg Traurig LLP (Greenberg) and Robert Ivanhoe, the chair of Greenberg's global real estate practice, are Alliance's counsel (collectively, the Attorneys).

Beginning in or about 2003, disputes arose between NAMA, the Managers, and other members of Alliance concerning, inter alia, NAMA's purported refusal to provide funding for the WMC Project in response to allegedly improper capital calls, and NAMA's complaints that the Managers failed to provide it with certain information as required by Alliance's operating agreement. Alliance retained the Attorneys as the company's counsel in 2003. In April 2004, NAMA, the Managers, and other entities entered into a settlement agreement, which temporarily resolved their disputes. Related litigation and arbitration took place in

Delaware and California before NAMA finally commenced the instant action, asserting direct and derivative claims against the above-named defendants for breach of fiduciary duty and aiding and abetting such a breach, tortious interference with prospective economic advantage, legal malpractice, unjust enrichment, breach of contract, and conversion, and seeking declaratory and injunctive relief.[1]

In response to NAMA's document requests, the Attorneys produced a privilege log containing more than 3,000 entries (the Privilege Log), and objected to NAMA's subsequent requests seeking documents related to the 2011 transfer of Alliance's

[1] Specifically, NAMA alleges in its second amended complaint that the Attorneys breached fiduciary duties to Alliance and NAMA, as well as aided and abetted the Managers' breach of fiduciary duty by, among other things, advising and counseling the Managers with respect to their interference with NAMA's rights and the rights and benefits of the various Alliance companies under certain agreements. NAMA further alleges that the Managers engaged in self-dealing, with the assistance of the Attorneys, by creating a secret partnership known as the Blue Diamond Venture (BDV), an entity that directly competes with the WMC Project and in which the Attorneys improperly took a financial interest. NAMA claims that BDV wrongfully appropriated Alliance's intellectual property, usurped business opportunities belonging to Alliance, and violated an operating agreement governing the management of Alliance. The second amended complaint further alleges that the Attorneys actively assisted the Managers in their efforts to improperly burden the assets of the WMC Project, convert for their own benefit the assets and funds of the Alliance companies, divest NAMA of its interest in Alliance or the WMC Project, and burden the Alliance companies with imprudent debt and improper calls for capital investment to the detriment of NAMA and the Alliance companies.

entire interest in the WMC Project to a newly formed entity known as International Market Centers LP (the IMC Transfer).

NAMA moved to compel the production of all documents identified in the Privilege Log and all documents responsive to NAMA's requests regarding the IMC Transfer, arguing that neither the attorney-client privilege nor the work-product privilege justified defendants' withholding of the documents. NAMA asserted that, in light of a California arbitral finding that "subsequent to the formation of [World Market Center Venture, LLC, an entity created by the 2004 settlement agreement], [the Managers] largely abdicated their contractual duties to act on behalf of Alliance," NAMA was the only party safeguarding Alliance's interests. In addition, NAMA argued that the "fiduciary exception" to the attorney-client privilege compelled production, because the Managers owed a fiduciary duty to NAMA and accordingly sought legal advice on its behalf. NAMA also argued that the crime-fraud exception to the attorney-client privilege warranted disclosure, because defendants were acting in furtherance of various intentional torts and possible crimes.

The motion court, in an order entered on April 30, 2013 (the 2013 Order), determined that defendants had met their burden of establishing that some of the withheld documents might be privileged, and referred the matter to a special referee for an

"item-by-item" review.

The court found that NAMA had established good cause for applying the fiduciary exception to the attorney-client privilege, noting that the communications as to which defendants asserted the privilege were made between the Managers and counsel at a time when the Managers had "abdicated" their duties to Alliance and the WMC Project (after WMCV was created in April 2004). "[P]ursuant to the fiduciary exception," the court stated, "the privilege does not apply as to communications during the period of time that the parties were not in an adversarial posture." However, the court stated, the privilege would apply to communications that occurred after an adversarial relationship (if any) developed between NAMA and Alliance, depending on their content, and the court noted that there was evidence indicating that an adversarial relationship "may" date back to 2003.

The court directed the special referee specifically to consider whether NAMA and Alliance ever developed an adversarial relationship. It also directed the referee to consider whether the crime-fraud exception applied to the communications itemized in the Privilege Log, to consider other relevant issues such as a spoliation claim raised by NAMA, and to conduct an examination of individual documents to determine, inter alia, whether they could be withheld under the joint-defense and common-interest

privilege. The court found that NAMA was entitled to the IMC Transfer documents, despite defendants' objections that the documents were irrelevant because the transaction occurred more than a year after the filing of the second amended complaint.

The special referee conducted a hearing focused on whether an adversarial relationship existed between NAMA and Alliance, and concluded that no such relationship existed and that all the documents identified in the Privilege Log should be produced. He did not make any determination as to spoliation or the crime-fraud exception to the privilege. NAMA moved to confirm the report, and defendants opposed the motion.

In an order entered August 29, 2014, the court confirmed the special referee's report. The court rejected the Attorneys' argument that it had already found an adversarial relationship, stating that it "made no conclusion [in the 2013 Order] as to whether there was an adversarial relationship at all, let alone on that particular date [in 2003]." The court then rejected Greenberg's argument that *Barasch v Williams Real Estate Co.* (104 AD3d 490 [1st Dept 2013]) mandated a finding of adversity, stating that

> "the finding of adversity in *Barasch* was highly dependent on the facts of that case and hinged on the type of claim asserted by the plaintiff [i.e. a non-derivative, direct claim by a director/shareholder against the corporation]. . . . Conversely, the instant claim is brought by NAMA

> *derivatively*, on behalf of [Alliance]. Therefore, NAMA is not adverse to [Alliance]; in fact, by bringing this claim derivatively, NAMA is seeking to vindicate [Alliance's] rights vis-à-vis the defendant Managers who are alleged to have breached their duties to the company."

The court also rejected Greenberg's arguments that this litigation is "*per se* adverse" and that NAMA's long-standing dispute with the Managers evidenced adversity between NAMA and Alliance.

The court found the referee's report to be fully supported by the record, citing, for instance, the April 2004 settlement agreement entered into by the Managers and Alliance's three member companies, including NAMA, which indicated that any disputes were between NAMA and the Managers; testimony of defendant Samson and that of Nigel Alliance, an owner of NAMA, as well as correspondence between NAMA and the Managers, confirming the same; and the California arbitration, which further established the existence of a conflict between NAMA and the Managers, rather than between NAMA and the Alliance companies.

The court rejected the Attorneys' argument that NAMA had no "protectable interest" in the documents pertaining to Phase III of the WMC Project.[2] It concluded that the Attorneys had failed

[2] The California arbitration determined that NAMA had lost its interest in Phase III, because it placed conditions on its tender of capital for that phase.

to demonstrate that NAMA's interest in those documents, or lack thereof, had any bearing on whether the documents should be produced.

The court found that the Attorneys waived their argument that the documents contained privileged communications regarding the instant action, because they did not present that argument to the special referee and that, in any event, the Attorneys had "failed to offer any competent evidence – or even a citation – in support."

Accordingly, the court ordered defendants to produce all documents identified in the Privilege Log and any responsive documents relating to the IMC Transfer (which it had already directed be produced in the 2013 Order).

This appeal followed.

II. Discussion

a. The fiduciary exception to the attorney-client privilege

The oldest evidentiary privilege recognized at common law, the attorney-client privilege "fosters the open dialogue between lawyer and client that is deemed essential to effective representation" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). The privilege, now codified in CPLR 4503(a), "exists to ensure that one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure

in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment" (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]).

"The [attorney-client] privilege, however, is not limitless. It has long been recognized that [it] constitutes an obstacle to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose" (*id.* at 68 [internal quotation marks omitted]). "Defining the limits of the privilege is, of course, not an easy task . . . [since] no clear rule of general application can be simply articulated. Indeed, . . . much ought to depend on the circumstances of each case" (*id.* [internal quotation marks omitted]).

In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a "fiduciary exception" to the privilege that otherwise attaches to communications between management and corporate counsel. This Court has not previously defined the parameters of the exception, so we take the opportunity to do so here.

The fiduciary exception has its origins in English trust

law, which long ago recognized that the fiduciary nature of the relationship between a trustee and a beneficiary of a trust provides an exception to the privilege with respect to communications between the trustee and the trust's attorney (*see* Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 Tort & Ins LJ 827, 832-833 [1999]; *Riggs Natl. Bank of Washington, D.C. v Zimmer*, 355 A2d 709, 712 [Del Ch 1976], citing *Talbot v Marshfield*, 2 Drew & Sm 549, 62 Eng Rep 728 [Ch 1865]; *Wynne v Humberston*, 27 Beav 421, 54 Eng Rep 165 [1858]; *In re Mason*, 22 Ch D 609 [1883]). The theory is that when a trustee seeks legal advice in executing his or her fiduciary duties, he or she is acting ultimately on behalf of the beneficiaries of the trust and, accordingly, cannot cloak his or her actions from them, the attorney's "real clients" (*see* 34 Tort & Ins LJ at 832-833; *Riggs*, 355 A2d at 713-714).

In 1970, the U.S. Court of Appeals for the Fifth Circuit extended the fiduciary exception to the corporate environment in *Garner v Wolfinbarger* (430 F2d 1093 [5th Cir 1970], *cert denied* 401 US 974 [1971]), for the first time allowing shareholders to use the exception to pierce the corporate attorney-client privilege. The *Garner* court was persuaded by two English cases that "treat[ed] the relationship between shareholder and company as analogous to that between beneficiaries and trustees" (*id.* at

1102). Relying on those cases and the traditional crime-fraud and joint-representation exceptions for the proposition that the corporate attorney-client privilege is not absolute, the court summarized its reasoning in the following way:

> "[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance" (*id.* at 1103-1104).[3]

Despite its critics,[4] the fiduciary exception has been widely accepted throughout most of the United States in trustee-beneficiary and corporation-shareholder cases (*see e.g. In re United States*, 590 F3d 1305, 1311-1312 [Fed Cir 2009] [noting that the fiduciary exception "is now well established among

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[3] While the party asserting the privilege – here, defendants – bears the initial burden of establishing the right to protection (*Spectrum Sys. Intl*, 78 NY2d at 377), *Garner* illustrates that the burden then shifts to the party asserting an exception to the privilege.

[4] *See e.g.* Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 Hofstra L Rev 817, 834 (1984) (arguing that *Garner*'s fiduciary exception is not only superfluous given the preexisting exceptions to the attorney-client privilege, but also "would be detrimental to legitimate corporate interests"); Benjamin Cooper, Note, *An Uncertain Privilege: Reexamining Garner v. Wolfinbarger and Its Effect on Attorney-Client Privilege*, 35 Cardozo L Rev 1217 (2014) (arguing that *Garner* should be limited to suits involving predominantly derivative claims).

(federal circuit courts)" and that "no federal court of appeals has rejected the principle, but have only declined to apply the exception in cases where the facts did not justify its application"], *revd and remanded on other grounds sub nom United States v Jicarilla Apache Nation*, __ US __, 131 S Ct 2313 [2011] [rejecting application of fiduciary exception to federal government in its capacity as "trustee" of Indian funds]).

Several New York courts have also recognized the fiduciary exception – both in corporation-shareholder and trustee-beneficiary cases – and we are not aware of any that have rejected it outright (*see e.g. Beard v Ames*, 96 AD2d 119, 121 [4th Dept 1983], quoting *Garner*, 430 F2d at 1101 ["We are persuaded that corporate management, since it has duties which run ultimately to the benefit of the stockholders, cannot hide behind 'an ironclad veil of secrecy' and that under certain circumstances its judgment may be questioned"]; *Hoopes v Carota*, 142 AD2d 906, 910 [3d Dept 1988], *affd* 74 NY2d 716 [1989]; *Matter of Bank of N.Y. Mellon*, 42 Misc 3d 171, 178-182 [Sup Ct, NY County 2013]; *Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 111-113 [Sup Ct, NY County 2003]). Although this Court found the exception to be inapplicable in *Beck v Manufacturers Hanover Trust Co.* (218 AD2d 1, 17-18 [1st Dept 1995]) – because the plaintiffs were adverse to the trustee

and the communications related to "the handling of the very issues the plaintiffs had been threatening to litigate" – we did not reject the principle (*see also Lehman v Piontkowski*, 84 AD2d 759, 760 [2d Dept 1981] [declining to apply *Garner* to claims by 40% shareholder against corporation to enforce restrictive covenant in employment agreement]).[5]

In extending the fiduciary exception to the corporate sphere, the *Garner* court set forth a non-exhaustive list of factors that should be considered to determine whether a party has shown good cause for applying the exception in a given case.[6]

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[5] In 2002, the legislature amended CPLR 4503 by adding subsection 4503(a)(2), effectively eliminating the "fiduciary exception" with respect to communications between counsel and the personal representatives of decedents' estates. However, "[b]ecause of the definitional limitations of the amendment, it is a fair inference that the Legislature intended to leave the fiduciary exception intact with respect to attorney-client communications in contexts other than the representation of estate fiduciaries and specified Article 81 guardianships" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4503:7).

[6] These factors include (1) "the number of shareholders and the percentage of stock they represent," (2) "the bona fides of the shareholders," (3) "the nature of the shareholders' claim and whether it is obviously colorable," (4) "the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources," (5) "whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality," (6) "whether the communication related to past or to prospective actions," (7) "whether the communication is of advice concerning the litigation itself," (8) "the extent to which the communication is identified versus the extent to

Since then, several different tests have been formulated; yet it has been said that "[t]he precise meaning of 'good cause' has not been articulated by the New York courts" (5 NY Prac, Evidence in New York State and Federal Courts § 5:9 n 6). In *Hoopes v Carota* (142 Ad2d 906 [3d Dept 1988]), the Third Department considered several factors that appear tailored to a trustee-beneficiary case but generally correlate with those articulated in *Garner* (*compare Hoopes*, 142 AD2d at 910, *with Garner*, 430 F2d at 1104). The Restatement of the Law Governing Lawyers offers a test that appears more succinct than the others – focusing primarily on the balancing of the requesting party's need for information against the threat to corporate confidentiality (*see* Restatement [Third] of Law Governing Lawyers § 85 [2000]), which is indeed the overarching consideration. However, in its comments section the Restatement sets forth a version of the *Garner* test with no fewer than 10 factors for consideration (*see id.* § 85 and comment *c*).

The *Garner* test remains viable, and it strikes the appropriate balance between respect for the privilege and the need for disclosure; therefore, we adopt it here. It has been generally followed without significantly discouraging corporate

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which the shareholders are blindly fishing," and (9) "the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons" (430 F2d at 1104).

attorney-client communications (*see* Restatement [Third] of Law Governing Lawyers § 85, Reporter's Note, comment *b* ["Although the *Garner* rule does increase uncertainty to some extent, the risk is not great for organizations attempting to comply with the law in good faith"] [internal citation omitted]; Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St John's L Rev 191, 355-356 [1989] [empirical survey of corporate attorneys suggested that the *Garner* doctrine does not negatively impact corporate attorney-client communications]). Moreover, the requirement of a good-cause showing appropriately accounts for the sensitive nature of discovery disputes over attorney-client privilege, particularly in the corporate context.[7]

Here, the motion court determined that NAMA demonstrated good cause to apply the fiduciary exception to the withheld

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[7] In *Hoopes*, the Third Department acknowledged that some courts in other jurisdictions have held that "the privilege does not attach at all" where a fiduciary relationship exists, but the court utilized a good-cause test because, "[t]o the extent that . . . decisions [requiring good cause] emphasize a case-by-case analysis, weighing the individual circumstances presented to determine whether or not the privilege should apply, they appear to be more consistent with the approach to attorney-client privilege issues adopted by the Court of Appeals" (142 AD2d at 909-910). We agree. A blanket application of the exception whenever a fiduciary relationship is present would too easily abrogate the privilege, thereby discouraging candid discussion between corporate attorneys and management.

communications without considering the factors set forth in either *Garner* or *Hoopes*. Indeed, the only support for the finding of good cause in the 2013 Order is the California arbitral finding that the Managers had "abdicated" their duties to Alliance during a period of time in which some of the communications took place. This is relevant to whether plaintiff's claims against defendants are "colorable" (*see Garner*, 430 F2d at 1104) but it indicates nothing about the other good-cause factors. For example, we do not know whether the approximately 3,000 communications on the Privilege Log pertain to past or prospective actions, whether the information sought is available from other sources, or whether any of the communications concern advice regarding the instant litigation.[8]

Thus, although defendants do not take issue with the motion court's finding of good cause – they focus on the determination that there never was an adversarial relationship between NAMA and Alliance – we conclude that the case must be remanded for the court to conduct a comprehensive good-cause analysis. The court, given its discretion under CPLR article 31, may not need to evaluate each factor listed in *Garner.* However, where a court finds that a shareholder has demonstrated good cause to apply the

[8] Defendants contend that the first several communications on the Privilege Log concern the instant action.

fiduciary exception and pierce the corporate attorney-client privilege, it must at least address those factors that support such a finding. This type of scrutiny is vital to ensure that courts do not arbitrarily order disclosure of corporate attorney-client communications.

b. Adversity: a threshold question or "good cause" factor?

Defendants place great emphasis on what they term the "adversity limitation," which they contend is dispositive; they maintain that, if at some point NAMA pursued interests that were adverse to those of Alliance, then the fiduciary exception would be inapplicable to any communications between the Managers and counsel from that point forward. Thus, defendants argue, on the ground that the parties have been adverse since 2003, that NAMA is not entitled to any of the withheld communications, regardless of whether adversity is a threshold question or a component of the good-cause inquiry. Conversely, NAMA contends that it is entitled to all the withheld communications because there is no adversity limitation to the fiduciary exception and, in any event, NAMA was never adverse to Alliance. As is often the case, the resolution of this issue lies somewhere between the parties' positions.

While some factors in the *Garner* test are relevant to a determination of adversity, *Garner* did not create a categorical

adversity limitation. Thus, adversity is not a threshold inquiry but a component of the broader good-cause inquiry. Moreover, of the *Garner* factors that pertain to adversity, some will indicate whether the parties are generally adverse, while others will require a review of the communications in dispute; the relevant factors may weigh against finding good cause to apply the fiduciary exception with respect to those communications that reveal adversity. Accordingly, a court may find that the party seeking disclosure has shown good cause to be given access to some communications but not others.

The first two factors in the *Garner* test - the number of shareholders and the percentage of shares they represent, and the bona fides of the shareholders (430 F2d at 1104)[9] - are relevant to adversity. That NAMA is a 70% majority investor in Alliance and is suing the Managers derivatively suggests that it is not, in this action, generally adverse to Alliance. However, while the derivative nature of a shareholder's claim tends to support a finding of good cause, it is not dispositive.[10] As the *Garner*

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[9] These factors correspond with the "identity of interests" factor in the *Hoopes* analysis (142 AD2d at 910).

[10] As defendants point out, the motion court distinguished this case from *Barasch v Williams Real Estate Co., Inc.* (104 AD3d 490) on the ground that NAMA sued derivatively and therefore was not adverse to the Alliance Companies. However, *Barasch* did not turn on the petitioner's assertion of a direct claim against the

court explained, in connection with motions to dismiss the derivative claim from that action, its "decision d[id] not turn on whether that claim [was] in the case or out" (430 F2d at 1097 n 11). The Fifth Circuit has since observed that a non-derivative suit creates more problems for a plaintiff arguing good cause, but it did not state that good cause could not be shown; it explained that the shareholder's motivations in such a case are "more subject to careful scrutiny" in determining whether good cause exists (*Ward v Succession of Freeman*, 854 F2d 780, 786 [5th Cir 1988], *cert denied* 490 US 1065 [1989]; *see also* Alexander, 63 St John's L Rev at 364-365).

Analysis of other *Garner* factors that might reveal adversity – for example, "whether the communication related to past or to prospective actions" or "whether the communication is of advice concerning the litigation itself" (430 F2d at 1104) – will ordinarily require in camera review of the communication(s). If the documents or other evidence objectively demonstrate an adverse relationship between the shareholder plaintiff and

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corporation; it held that the petitioner, a shareholder-director suing in her capacity as a shareholder, could not use her position as a director to waive the corporate attorney-client privilege to gain access to privileged communications concerning "how to deal with [her]," because she was adverse to the corporation as demonstrated by emails between the other directors and counsel and by the petitioner's retention of separate counsel (104 AD3d at 492).

corporate management, then those communications that (1) concerned "how to deal with" the plaintiff (*Barasch*, 104 AD3d at 492), (2) were "specifically relevant to the handling of the very issues the plaintiff[] had been threatening to litigate" (*Beck*, 218 AD2d at 17-18), or (3) were "of advice concerning the litigation itself" (*Garner*, 430 F2d at 1104) will likely remain privileged - unless other factors are strong enough to establish good cause.[11] Other communications that are germane to the allegations in the complaint, even those that occurred after adversity arose, would still be discoverable pursuant to the fiduciary exception (provided good cause exists). This communication-specific adversity inquiry operates as a fail-safe, maintaining balance in the operation of the fiduciary exception; where communications evince an adverse relationship and contain advice on how corporate management might handle the shareholder, a finding of good cause is less likely. Without such an inquiry, particularly where, as here, the withheld communications are so numerous, the danger of ordering disclosure of privileged communications is significant.

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[11] Although *Barasch* is not binding here, because it addressed adversity outside the context of the fiduciary exception, we find its analysis (together with *Beck*'s) instructive with respect to the nature of the relationship between a shareholder and a corporate board (*see Barasch*, 104 AD3d at 492]; *Beck*, 218 AD2d at 17-18]).

The adversity question is therefore not one of timing, as defendants contend, but is answered by the communications' content. For this reason, we reject defendants' argument that, if NAMA were adverse to Alliance at some point, *all* subsequent communications between the Managers and the Attorneys would rest beyond the fiduciary exception's reach. Communications regarding defendants' alleged breach of fiduciary duties could have occurred at the same time as attorney-client communications regarding how to deal with NAMA (for example, during the California arbitration); it would frustrate the balancing of interests in attorney-client privilege cases to permit defendants to withhold communications that might reveal the alleged wrongful conduct simply because the parties were adverse at some point in the past. Thus, the motion court correctly stated that whether communications that occurred after an adversarial relationship developed are privileged depends on their content.

This is where a court's ability to conduct in camera review of the communications is crucial (*see Spectrum Sys. Intl.*, 78 NY2d at 378 ["whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review"] [internal citation omitted]; *see also Stenovich*, 195 Misc 2d at 102 [discussing court's in camera review of arguably privileged documents]). Absent a

review of the communications (or at least a sampling thereof), it would be impossible to determine whether they involved advice concerning the instant litigation or "how to deal with" NAMA.[12]

We recognize that this case presents the motion court with a difficult task, given the number of communications listed on the Privilege Log. In addition, we are mindful of the latitude to be accorded to the motion court's discovery determinations under CPLR Article 31 (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]). However, it is uncontested that the special referee did not review a single document in camera, despite being instructed by the motion court to conduct an item-by-item review. Therefore, we cannot affirm an order directing the production of more than 3,000 purportedly privileged communications without a single one of those communications

[12] The descriptions of some of the items listed on the Privilege Log suggest that certain communications occurred at a time when NAMA had hired separate counsel and concerned how the Managers would handle disputes with NAMA, for example, "Attorney client email correspondence re draft response to NAMA," "Attorney client email correspondence teleconference with NAMA's counsel," and "Attorney client email correspondence re Alliance settlement with NAMA." Others appear to be less related to how to deal with NAMA (e.g. "Internal email correspondence re Operating Agreement," "Internal email correspondence re Articles of Merger," "Attorney client email correspondence re distribution of money," "Attorney client email correspondence re partnerships and capital gains." To determine whether these communications involved advice concerning the instant litigation and whether the Managers were seeking advice on how to deal with NAMA, the communications themselves would have to be reviewed.

having been reviewed.[13]

c. IMC Transfer and Phase III documents

We agree with the motion court that the IMC Transfer documents are discoverable, since they are relevant where the transaction allegedly resulted in the forfeiture of Alliance's entire interest in the WMC Project, notwithstanding that the transaction occurred after the events described in the second amended complaint. Defendants may raise issues of privilege with respect to those documents if so advised.

We agree with defendants that the Phase III documents fall outside the fiduciary exception. NAMA concedes that, as a result of the California arbitration proceedings, it lost all rights and interests in the third phase of the WMC Project. Because NAMA has no interest in Phase III, Alliance and the Managers have no fiduciary duty to NAMA with respect to that phase. Thus, NAMA is not entitled to rely on the fiduciary exception to obtain privileged attorney-client communications related to Phase III of the WMC Project.

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[13] Since the fiduciary exception does not apply to attorney work product (*see Jicarilla Apache Nation v United States*, 88 Fed Cl 1, 12-13 [Fed Cl 2009], *mandamus denied and remanded on other grounds* 460 Fed Appx 914 (Fed Cir 2011); Martin & Metcalf, *The Fiduciary Exception*, 34 Tort & Ins LJ at 857), it may also be necessary to inspect some of the documents to determine whether they were prepared in anticipation of litigation.

III. Conclusion

Accordingly, the orders of Supreme Court, New York County (Eileen Bransten, J.), entered April 30, 2013, and August 29, 2014, which granted plaintiff's motion to compel the production of certain privileged documents, should be reversed, on the law, with costs, the motion denied, and the matter remanded for further proceedings consistent herewith.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 8, 2015

CLERK